



MEMORANDUM

November 23, 2018

TO: BOARD OF DIRECTORS, CRWCD
FROM: ANDY MUELLER,
SUBJECT: CWCB NOVEMBER 15, 2018 POLICY STATEMENTS ON DEMAND MANAGEMENT AND COMPACT ADMINISTRATION

Requested Actions:

1. *Staff recommends that the Board adopt a motion indicating its support for the Demand Management Policy Statement and the Compact Administration Policy Statement contained within the CWCB's November 15, 2018 "Support and Policy Statements Regarding the Colorado River Drought Contingency Plans, Demand Management, and Compact Administration." This statement of support is made with the express understanding that the intent of the CWCB staff and Board that the "roughly proportionate contributions of water" referenced in paragraph six of the Demand Management Policy Statement is intended to be geographically equitable.*
2. *Staff recommends that the Board indicate its support for the concept of federal legislation which is limited in scope to directing, "the Secretary of the Interior to execute and carry out the provisions of the five interstate agreements as soon as they are executed by the parties" subject to this Board's review and approval of the final proposed legislative language.*

Relevant River District Strategic Plan Initiatives:

4. Colorado River Supplies:

4. B. *The River District will advocate for full protection and preservation of water rights perfected by use prior to the effective date of the 1922 Compact and thereby excluded from curtailment in the event of compact administration.*

4. C. *The River District will continue to study mechanisms, such as a Compact Water Bank and Contingency Planning that include demand management, drought operations of CRSP reservoirs, and water supply augmentation to address the risk of overdevelopment.*

4. D. *The River District will work with the State Engineer's Office and other interested parties to develop an equitable mechanism for potential compact administration.*

5. Transmountain Diversions:

5. B. *The River District will work to ensure that the IBCC Conceptual Framework is honored and fairly implemented.*

6. Agricultural Water Use:

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6. A. The River District will continue to study the concept of a voluntary and compensated compact water bank in collaboration with other stakeholders to best preserve western Colorado agriculture.

6. B. The River District will explore alternative transfer methods that allow agricultural water users to benefit from the value of their water rights without the permanent transfer of the rights, and without adverse impacts to the local communities and the regional economy.

6. C. Although the River District recognizes that some reductions in demands of agricultural water rights may be necessary to protect existing water uses in the basin, the District will work to ensure that the burden of demand reduction is shared across all types of water use sectors, and that agricultural water rights, and agriculture itself, are not injured.

6. D. The River District will protect the integrity of senior agricultural water rights within Colorado's prior appropriation system, recognizing the potential risks to those rights posed by the constitution's municipal right of condemnation.

8. Colorado's Water Plan:

8. B. The River District will work with the, Southwest Water Conservation District, the Southwest Basin Roundtable and the three Basin Roundtables that comprise the District to achieve a consistent West Slope perspective related to contingency planning and compact administration risk matters.

8. C. The River District will work with east slope roundtables to enhance east slope understanding of West Slope perspectives while also enhancing West Slope understanding of east slope perspectives.

8. D. The River District will work with existing transmountain diverters to set a priority on contingency planning and compact administration risk management in order to provide a high level of protection for all of Colorado's existing Colorado River water uses.

8. E. The River District will work to ensure that the IBCC Conceptual Framework is honored and fairly implemented.

I. Introduction and Background

On November 15, 2018, the CWCB unanimously adopted the attached Support and Policy Statements Regarding Colorado River Drought Contingency Plans, Demand Management and Compact Administration ("CWCB Document"). The CWCB Document contains four distinct sections:

1. A lengthy prefatory statement;
2. A statement of support for the Upper Basin Drought Contingency Plan Documents and accompanying federal legislative efforts;
3. A Demand Management Policy Statement; and
4. A Compact Administration Policy Statement.

The CWCB Document was adopted by the Board in large part due to the efforts of the Colorado River District and the Southwestern Water Conservation District ("West Slope Conservation Districts"). As you will recall, in September, the West Slope Conservation Districts requested that the CWCB pass a resolution adopting six principles and a commitment to a very public, consensus driven process which would guide this State's efforts to develop and implement a Demand Management program in response to the 19 year long poor hydrologic conditions in the Colorado River Basin. The West Slope Conservation Districts were concerned that the Upper Colorado River Commission ("UCRC") and the state of Colorado were literally racing to approve the agreements and pursue federal legislation which would authorize a non-balanced, non-equalized storage account in Lake Powell and the other CRSPA Initial Storage Reservoirs to be filled by undefined demand management activities in the Upper Basin states ("Storage Account"). Our

District had many concerns regarding the establishment of this Storage Account. Prime among our concerns was that without the adoption of appropriate principles, definitions and/or sideboards, a demand management program could result in significant adverse impacts to West Slope agriculture and communities. This concern was motivated, at least in part, by the potential that a demand management program could result in a disproportionate impact to West Slope communities due to relative imbalance between the economies of the Front Range and the West Slope. In addition, some entities believe that a voluntary/compensated program will not produce sufficient water and that the storage account will need to be filled by mandatory uncompensated curtailment of water rather than voluntary, temporary and compensated reductions in consumptive use. Depending on how it is implemented, a "pre-emptive curtailment" of post compact water rights also could disproportionately impact West Slope agriculture and the families and communities that depend upon it. The District also expressed concerns that such a program cause no injury to other water rights and that it be established in compliance with existing Colorado law including the prior appropriation doctrine. Furthermore, the West Slope Conservation Districts pushed hard for a statement that any Demand Management program would not serve to allow for a new transmountain diversion project as aptly expressed in principle four of the conceptual framework in the Colorado Water Plan.

The CWCB Document is the product of a significant drafting effort by staff at the CWCB, attorneys at the Attorney General's office and members of the CWCB Board all of whom received significant input and pressure from stakeholders in the Colorado River including staff and counsel at the West Slope Conservation Districts and trans-mountain diversion operators. The final product goes a long way toward meeting the requests of the River District. As expected in any negotiated document, the CWCB Document does not adopt the exact wording and preferences of the West Slope Conservation Districts. While the specific language of our requested six principles was watered down, the key concepts of the principles remain primarily intact. Additionally, by creating two distinct policies, one addressing Demand Management and one addressing Compact Administration, the CWCB clarified that Demand Management is a voluntary, temporary and compensated effort separate and distinct from administration of water rights to satisfy and/or prevent a compact violation should one ever be declared and that if, and only if, a Demand Management program "is not sufficient to ensure Colorado's compliance with the Colorado River Compact" will the state then turn to an extensive public process to examine and develop alternate measures and/or rules for compact compliance administration with the goal of reaching a general consensus within the state.

II. Concerns

One of the primary areas of concern for the West Slope Conservation Districts is that any Demand Management program not have disproportionate impacts on the West Slope and that water contributed to such a program be produced in rough proportion to the post compact depletions to the Colorado River system from both sides of the continental divide. We did not and do not want to see the West Slope producing all of the water for Colorado's share of an Upper Basin Demand Management Program. This principal is addressed in section 6 of the Demand Management Policy Statement. The language in this statement is not what we had hoped the CWCB would adopt, the CWCB did clarify on the record at the November 15th hearing prior to the CWCB's adoption of

the policy that the intent of the language is that water should be contributed equitably from users from both the west and eastern sides of the continental divide.

We recognize that these policies are far from perfect, we do however believe that they represent a good faith effort by the CWCB at demonstrating leadership and a commitment to many of the policies adopted by our Board. We also recognize that the passage of this policy is just the beginning of our effort to assure that any Demand Management program in the state of Colorado not disproportionately harm the West Slope of Colorado.

The CWCB Document also contains a Statement of Support for the DCP documents and the accompanying federal legislation. As of the writing of this memorandum, we have not yet seen the proposed federal legislation. My communications with Colorado's Commissioner to the UCRC indicates that there is not yet formal proposed legislative language due to the lack of agreement within all seven states (read "Arizona"). Commissioner Eklund indicates that he and others believe that the federal legislative language will be very simple, essentially "direct[ing] the Secretary of the Interior to execute and carry out the provisions of the five interstate agreements as soon as they are executed by the parties." In keeping with our District practices regarding the endorsement of legislation, whether federal or state level, we cannot recommend that this Board endorse the actual federal legislation until we have had chance to review and understand the same, however, it may be helpful for this Board to provide direction to staff and counsel regarding the proposed legislative approach. Additionally, the preamble to the policy statements contain statements that do not directly relate to the policy statements requested by our Board. We believe that it is not appropriate for this District to endorse the language which precedes the policy statements.

III. Communication from Glenn Porzak

On Wednesday afternoon, we received a letter from Glenn Porzak on behalf of his clients at the Eagle River Water and Sanitation District and the Upper Eagle Regional Water Authority ("District and Authority"). A copy of the letter is included with this memorandum. We believe that the letter is the result of the hurried process pursued by the CWCB in pushing for approval of the DCP documents and the endorsing the federal legislation. This hurried process did not allow for enough time for major stakeholders such as the District and Authority to get up to speed on this process or fully engage with River District staff and counsel. That being said, we do not agree with Mr. Porzak's portrayal of the two policies as he expresses concerns in the letter that neither your General Counsel or General Manager share. Mr. Porzak's concerns can be summarized as follows:

1. Paragraph six of the Demand Mangement Policy Statement is "*an obvious effort to protect transmountain diverters*" and he implies that we should therefore reject it.
2. Mr. Porzak also appears to mischaracterize the reason for avoiding a compact violation as solely based upon a fear that all West Slope water rights will be federalized.
3. Mr. Porzak also objects to the portion of the Compact Compliance Policy in which the CWCB commits to collaborate with the Division of Water Resources to develop rules for

compact compliance. He sees this statement, which was the result of this District's direct input, as a threat to our state's prior appropriation doctrine.

These concerns are addressed below:

As this Board is aware, paragraph six only addresses a voluntary, compensated and temporary demand management program which is aimed at protecting all existing uses and some reasonable future development of water in the Colorado River from the impacts and repercussions of a compact call. The key principles intended by paragraph six thus is only that a voluntary program avoid disproportionate impacts (i.e., that the West Slope and transmountain users share in the burden of contributing actual water to the demand management account).

As this Board is well aware, other potential ramifications of allowing a compact call to occur may be the acceleration of the permanent buy and dry of West Slope agriculture. Among the repercussions of a compact violations may be actions by the United States Department of Interior to reduce the delivery and/or operation of water rights held by the federal government for federally operated projects, which include but are not limited to some of the most significant economic drivers on the West Slope, the Uncompahgre Project, the Dolores Project and the Grand Valley Project. The Demand Management Policy Statement and Paragraph Six thus do not apply to or attempt to abrogate the prior appropriation doctrine. It merely outlines a voluntary, cooperative effort to stave off a compact violation which is consistent with this Board's relevant strategic plan goals quoted at the beginning of this memorandum.

With respect to the concern that this policy is not consistent with the prior appropriation system, we do not share that concern. Specifically, paragraph 7 of the policy states that any program shall "Comply with applicable state law. . ." which includes the bedrock principle of prior appropriation. Additionally, both policies adopted by the CWCB are very consistent with this District's policies on the Prior Appropriation doctrine and Colorado River Compacts. I have attached both to this memorandum for your reference and quote relevant portion of the River District's Prior Appropriation Policy Statement here:

Colorado River Water Conservation District Policy Statement:

The Colorado River Water Conservation District supports Colorado's system of prior appropriation as a fair and orderly system for allocating Colorado's scarce water resources. Moreover, Colorado's prior appropriation system has been proven to be both successful and flexible in addressing the public's changing demands, beneficial uses, and values regarding Colorado water resources (e.g., instream flow and recreation in-channel diversion water rights). Additional flexibility and adaptation of the prior appropriation doctrine may be warranted to ensure the equitable allocation of Colorado's remaining Colorado River Compact entitlement among the river's sub-basins within Colorado and to equitably allocate water uses and to ensure water rights (including conserved consumptive use) are equitably administered in the event of interstate compact administration.

Background/explanation to the policy:

The 1922 Colorado River Compact and the 1948 Upper Colorado River Basin Compact provide that under certain circumstances, Colorado may be required to curtail water uses within the Colorado River basin to comply with interstate compact administration. The strict application of the prior appropriation doctrine in the event of compact administration could result in extreme hardship and economic disruption throughout the state. Merely the potential for future curtailment may result in undesirable speculation and competition for firm water supplies as Colorado moves closer to its full compact entitlement. Therefore, limited and targeted future adaptation of the prior appropriation doctrine may be necessary in order to equitably allocate the state's remaining Colorado River entitlement and to equitably address the curtailment of water uses that may be necessary to comply with the 1922 and 1948 compacts.

We therefore recommend that this Board adopt our recommendation as stated above.



COLORADO

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November 15, 2018

SUPPORT AND POLICY STATEMENTS

REGARDING COLORADO RIVER DROUGHT CONTINGENCY PLANS, DEMAND MANAGEMENT AND COMPACT ADMINISTRATION

Since 2000, the certainty and security of the Colorado River water supply have been called into question. The entire Colorado River Basin is currently in the worst hydrologic cycle in the historic record. Between 2000 and 2018, the Basin has experienced the driest year on record (2002), and the driest consecutive two-year period on record (2012 and 2013). It has also experienced above-average runoff only five out of 19 years, and withstood a decline in storage levels at the two largest reservoirs in the Colorado River Basin - Lake Mead and Lake Powell - to less than half of full capacity. Further, recently published data indicate a likely continuation of the trend of reduced flows and increased demand throughout the Colorado River Basin. Regardless of whether this is an extended drought or the new normal hydrology, the potential impacts to the state and its citizens could be significant.

The importance to Colorado of its namesake river cannot be overstated. Originating as snowfall high in the Colorado mountains, water from the Colorado River is put to wide range of uses by agricultural, municipal, tribal, industrial, and non-consumptive water rights holders across the state. The Colorado River is an irreplaceable resource for the entire state.

Continued drought or worsening water supply conditions in the Upper Colorado River Basin could increase the risk of: (a) Lake Powell storage declining below critical elevations to maintain operational functionality; and (b) mandated curtailment of the exercise of water rights to maintain compliance with the Upper Colorado River Basin and Colorado River Compacts. Both risks could have serious implications for Colorado.

Faced with this reality, Colorado's Commissioner to the Upper Colorado River Commission and staff at the Colorado Water Conservation Board and Attorney General's Office have been working with the other Colorado River Basin States, the Federal Government, and relevant stakeholders to develop a Drought Contingency Plan (DCP) that can help minimize and mitigate the risks associated with consistently below average water supplies in the Colorado River Basin. The DCP is comprised of several agreements, involving the Secretary of Interior, the Upper Basin states, the Upper Colorado River Commission, and the Lower Basin states. The DCP as a whole establishes the provisions and framework within which the seven Basin States may act in conjunction with the Secretary of the Interior to mitigate risks of extended drought, while protecting their respective rights and interests consistent with the "Law of the Colorado River."



The DCP documents were posted in final review draft form on the CWCB's website on October 9, 2018. The seven basin states and the Department of Interior are currently in the process of vetting the DCP agreements with the public. Before the DCP agreements would be implemented in either the Upper or Lower Colorado River Basin, it is anticipated that they would be authorized by Congress and executed by the relevant signatory parties.

The Upper Basin DCP includes, among other things, a Drought Response Operations Agreement and a Demand Management Storage Agreement. The Drought Response Operations Agreement directs management of the Initial Units¹ consistent with existing operational permitting, and is intended to reduce the risk of Lake Powell declining below minimum power pool elevation. If Lake Powell were to drop below minimum power pool elevation, it would become financially and physically difficult to maintain existing water uses, compact compliance obligations, and hydropower generation. The Demand Management Storage Agreement is intended to help assure compact compliance and reduce the risk of mandatory curtailment by securing the ability to store water at the Initial Units at no charge for compact compliance purposes.

The Upper Basin DCP agreements do not certify, warrant or otherwise guarantee that a demand management program will be established in the Upper Basin. The agreements only provide an opportunity for the Upper Division States (Colorado, New Mexico, Utah, and Wyoming) to use available storage space at the Initial Units only if an approved Upper Basin demand management program is established. Such use would be free of charge and the water stored would not be subject to release under the 2007 Colorado River Interim Guidelines for Lower Basin Shortages and Coordinated Operations of Lake Powell and Lake Mead. Before any demand management program could be implemented in the Upper Basin, each state and the Upper Colorado River Commission must evaluate the feasibility of demand management concepts, reach agreement on a number of key points, and provide formal approvals.

Demand management activities that could be promoted in Colorado as a result of the DCP would likely involve intentionally reducing consumptive uses from the Colorado River System, and storing the conserved water at the Initial Units to help assure the Upper Basin's continued compact compliance. Any such actions require careful consideration of the impacts to individuals, communities, and local economies.

As the agency authorized to consider and establish the state's water policy, the Colorado Water Conservation Board has a responsibility to evaluate and implement mechanisms for the effective management and wise administration of the Colorado River within Colorado. Specifically, it is the express responsibility and within the purview of the Board to:

- i. devise and formulate methods, means, and plans for bringing about the greater utilization of the waters of the state (C.R.S. 37-60-106(1)(c) (2017));
- ii. gather data and information looking toward greater utilization of the waters of the state (C.R.S. 37-60-106(1)(d));

¹ The Initial Units refer to the units authorized under the Colorado River Storage Project Act, including Glen Canyon Dam, Flaming Gorge, Aspinall Unit (comprised of Blue Mesa, Morrow Point and Crystal Reservoirs), and Navajo Reservoir.



- iii. cooperate with the other states and Federal Government for the purpose of bringing about the greater utilization of the waters of the state of Colorado (C.R.S. 37-60-106(1)(e));
- iv. formulate and prepare drafts of state and federal legislation designed to assist in securing greater beneficial use and utilization of the water of the state and protection from flood damages (C.R.S. 37-60-106(1)(g));
- v. investigate and assist in formulating a response to the plans, purposes, procedures, requirements, law, proposed laws, or other activities of the federal government and other states which affect or might affect the use or development of water resources of this state (C.R.S. 37-60-106(1)(h)); and
- vi. foster the conservation of the water of the state by the promotion and implementation of sound measures to enhance water use efficiency in order to serve all the water needs of the state and to assure the availability of adequate supplies for future uses, and that necessary water services are provided at a reasonable cost. (C.R.S. 37-60-106(i)(r)).

In fulfilling its statutory obligations, the Board also recognizes that water rights holders and other stakeholders have a vital interest in understanding the elements and conditions of any possible demand management program in Colorado, as well as the state's intentions in investigating and potentially pursuing such a program within Colorado, in order to ensure that their rights, respective interests, and communities are valued and protected.

At the January 2018 meeting, the Board directed staff to proactively engage in a state-wide discussion regarding demand management. Since that time, CWCB staff has initiated outreach with interested water rights holders and stakeholders and robust discussions about the concept of demand management, and has developed a greater understanding of various perspectives, concerns, and considerations regarding demand management within Colorado.

The Board has also heard directly from interested water rights holders and stakeholders on demand management considerations via letters and public testimony at its September 2018 meeting.

With this contextual background, the Colorado Water Conservation Board sets forth the following Support and Policy Statements Regarding Colorado River Drought Contingency Plans, Demand Management, and Compact Administration.

STATEMENT OF SUPPORT

The Colorado Water Conservation Board expressly endorses the collective efforts of the seven Colorado River Basin States and Federal Government to plan and prepare for drought contingencies in the Colorado River Basin. Furthermore, the Board joins with Colorado's Commissioner to the Upper Colorado River Commission to present its full support for finalizing the Colorado River Basin Drought Contingency Plan documents in substantial conformance with the final review draft documents posted on the CWCB website on October 9, 2018, and for obtaining appropriate Congressional authorization of the DCP.



DEMAND MANAGEMENT POLICY STATEMENT

In consideration of the past, present and potential future hydrologic conditions confronting the Colorado River Basin, and in light of the above considerations, it will be the Colorado Water Conservation Board's policy to:

- (1) Develop the state's position and approach on whether and how to develop any Upper Basin Demand Management Program that could potentially be implemented within Colorado consistent with state law to avoid or mitigate the risk of involuntary compact curtailment and to enhance certainty and security in the Colorado River water supply.

Furthermore, in formulating the state's demand management position, it will be the Board's strategy to:

- (2) Convene a process to identify and evaluate the issues the state must address as part of any potential demand management program to be considered in Colorado and the Upper Basin.
- (3) Operate within, and subject to, the terms and conditions of the interstate Upper Basin Demand Management Storage Agreement (Agreement Regarding Storage at Colorado River Storage Project Act Reservoirs Under an Upper Basin Demand Management Program), including, but not limited to, the express understandings that:
 - a. Any water conserved under an Upper Basin Demand Management Program will be stored at the Initial Units without charge;
 - b. Any water conserved and stored under an Upper Basin Demand Management Program will be solely for the purpose of helping assure compliance with the Colorado River Compact;
 - c. Any water conserved and stored under an Upper Basin Demand Management Program shall not be released from Lake Powell except at the request of the Upper Colorado River Commission for the exclusive purpose of helping assure compact compliance; and
 - d. Any water conserved and stored under an Upper Basin Demand Management Program will be subject to evaporation assessments and volumetric limitations.
- (4) Engage in activities that further the goals expressed in Colorado's Water Plan, with specific consideration given to the principles and collaborative efforts set forth in Chapter 9.1 and Principle 4 of the Conceptual Framework in Chapter 8.
- (5) Investigate voluntary, temporary, and compensated reductions in consumptive use of waters that otherwise would deplete the flow of the Upper Colorado River System for the specific purpose of helping assure compact compliance. Consistent with the Upper Basin Demand Management Storage agreement, the Board may also join the UCRC and other Upper Basin States in any evaluation of importing of waters from outside the natural Colorado River watershed to augment the Upper Colorado River System for compact compliance purposes.



- (6) Prioritize avoidance of disproportionate negative economic or environmental impacts to any single subbasin or region within Colorado while protecting the legal rights of water rights holders. The Board will work with water rights holders and stakeholders to assess the feasibility of and promote mechanisms for obtaining roughly proportionate contributions of water consumptively used from the Colorado River System to a Demand Management program over a given timeframe from participants on each side of the Continental Divide.
- (7) Comply with applicable state law, including, but not limited to, the requirement that no action related to demand management cause material injury to other water rights holders.
- (8) Consider and be fully informed by the input and considerations of water rights holders and stakeholders potentially impacted by application of demand management strategies within Colorado, and institute a public review process for any such proposed demand management program.
- (9) Work with Colorado's Commissioner to the Upper Colorado River Commission to cooperate with the other Upper Division States of Wyoming, Utah, and New Mexico, as well as the Department of the Interior, to investigate and potentially develop a regional demand management program that considers and incorporates Colorado's demand management approach, and to ensure that water conserved within Colorado under any demand management program is not diverted and consumptively used by any other state.

COMPACT ADMINISTRATION POLICY STATEMENT

The Board understands that:

- 1) Investigation and development of an Upper Basin Demand Management Program will require resolving numerous technical, legal, economic, and policy questions with multiple water rights holders and stakeholders over an extended period of time; and
- 2) Continuation of the current trend in the Colorado River Basin's hydrologic cycle could hasten the time when formal action may be needed to accomplish compliance with the Colorado River Compact,

If the quantity of conserved water made available through the demand management strategies described in this policy is not sufficient to ensure Colorado's compliance with the Colorado River Compact, it will be the Board's policy to:

Encourage and collaborate with the Division of Water Resources to engage in timely and extensive public outreach regarding development of any alternative measures or rules for compact compliance administration to fully inform and seek input from intrastate water rights holders and stakeholders with interests in the Colorado River. Such process would be with the goal, but not the requirement, of achieving general consensus within the state, without constraining the Division of Water Resources' lawful administration of water rights in order to meet Colorado's compact obligations.



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November 21, 2018

Sent via email: pfleming@crwcd.org

Board of Directors
c/o Peter C. Fleming
General Counsel
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Dear Directors:

This letter is submitted on behalf of the Eagle River Water & Sanitation District ("District") and the Upper Eagle Regional Water Authority ("Authority"). The District and Authority are separate entities with separate boards of directors but are co-managed and have an integrated water system which serves 65,000 customers from Vail to Wolcott. Collectively, they are the second largest municipal water provider on Colorado's West Slope. The District and Authority have a portfolio of very senior water rights within the Colorado River basin. These parties are concerned by recent State actions regarding drought contingency planning and potential curtailment of water rights in Colorado due to the Colorado River Compact ("Compact").

The reason for concern is that the Colorado Water Conservation Board ("CWCB") has recently adopted a policy statement regarding drought contingency planning and Compact administration ("Policy Statement"). The Policy Statement is composed of two interrelated statements. First, the Demand Management Policy Statement, which calls for further study of a demand management program that would be temporary, voluntary, and compensated to fill Lake Powell with Compact compliance water to hedge against a call by the Lower Basin states. Second, the Compact Administration Policy Statement, which recognizes that if a demand management program fails for whatever reason, and hydrological conditions force a Compact call, the State will have to curtail water users until its Compact obligations are met. The Policy Statement calls for a public process to decide how such a curtailment would occur.

Although Colorado's prior appropriation doctrine is enshrined in the State constitution and supported by over 150 years of case law, nowhere does the Policy Statement mention it. Regarding its Demand Management Policy Statement, item 6 states that it will be the CWCB's policy to:

"Prioritize avoidance of disproportionate, negative economic or environmental impacts to any single subbasin or region within Colorado while protecting the legal

rights of water rights holders. The Board will work with water rights holders and stakeholders to assess the feasibility of and promote mechanisms for obtaining roughly proportionate contributions of water consumptively used from the Colorado River System to a Demand Management program over a given timeframe from participants on each side of the Continental Divide."

This language is an obvious effort to protect transmountain diverters with junior water rights and should be alarming to *all* senior West Slope water managers, owners, and organizations charged with protecting those rights.

It is also important to understand that the stated basis for pursuing the proposed voluntary, temporary, and compensated demand management program is that if the State does not act, the Federal government will step in and take over control of the administration of the State's water in order to avoid a Compact call. Such an action by the Federal government would be without any legal basis. Simply put, the Federal government has no legal authority to administer state water rights. *California v. U.S.*, 438 U.S. 645, 662 (1978) ("[e]xcept where the reserved rights or navigation servitude of the United States are invoked, *the State has total authority over its internal waters.*") (emphasis added).

Further, the Compact Administration Policy Statement states that if curtailment occurs, it will be the CWCB's policy to:

"Encourage and collaborate with the Division of Water Resources to engage in timely and extensive public outreach regarding the development of any alternative measures or rules for compact compliance administration to fully inform and seek input from interstate water rights holders and stakeholders with interests in the Colorado River. Such process would be with the goal, but not the requirement, of achieving general consensus within the state, without constraining the Division of Water Resources' lawful administration of water rights in order to meet Colorado's compact obligations."

Should Compact curtailment occur, it is not the CWCB's responsibility to "achieve general consensus within the state," it is the State Engineer's responsibility to enforce a Compact call via the Constitutionally and statutorily mandated priority system. *People ex rel. Simpson v. Highland Irr. Co.*, 917 P.2d 1242, 1252-53 (Colo. 1996) (... the essential function of a[n interstate] compact is to legally protect stream depletions for beneficial use under water rights within the state while making the required interstate deliveries... *[T]he duties of state water officials require them to administer the waters of the state in accordance with decreed priorities.*") (emphasis added).

Considering these issues, we have provided to your counsel the extensive research we have performed that conclusively demonstrates that (1) there is no mechanism in the Compact that would provide the Federal government with the authority to administer state water rights, especially if there is no Compact violation and the Upper Basin continues to meet its delivery obligations; (2) the law is clear that Western states have exclusive control over their internal waters; and (3) in the event of Compact curtailment, the State Engineer has no choice but to enforce a call according to the prior appropriation doctrine's priority system. The memorandum demonstrating these positions in detail has been unanimously approved by the boards of directors of the District and Authority.

The CWCB's lack of commitment to the State's constitution and laws demonstrates its intent to deviate from them should a Compact call occur. Such unlawful deviation would surely be to the benefit of junior Front Range water providers and the detriment of senior West Slope users. Given these concerning developments, the District and Authority urge you to withhold support of the CWCB's Policy Statement at your November 26, 2018, board meeting until the Policy Statement includes express language stipulating that any demand management program or Compact curtailment scheme will follow Colorado's prior appropriation doctrine. We believe the Colorado River District can and must do more to protect the vested rights of senior West Slope users. The District and Authority are prepared to vigorously defend their water rights from any scheme that deviates from the law.

Sincerely,



Glenn E. Porzak
District and Authority Water Counsel

cc: Andrew Mueller, Colorado River Water Conservation District General Manager
Eagle River Water & Sanitation District Board of Directors
Upper Eagle Regional Water Authority Board of Directors
Linn Brooks, District and Authority General Manager
Kristin H. Moseley
Gunnar J. Paulsen

Adopted July 18, 2006
Revised and readopted April 21, 2009
Revised and readopted April 17, 2012
Readopted April 15, 2015
Revised and readopted April 17, 2018
Re-revised and readopted July 17, 2018

Prior Appropriation

Colorado River Water Conservation District Policy Statement:

The Colorado River Water Conservation District supports Colorado's system of prior appropriation as a fair and orderly system for allocating Colorado's scarce water resources. Moreover, Colorado's prior appropriation system has been proven to be both successful and flexible in addressing the public's changing demands, beneficial uses, and values regarding Colorado water resources (e.g., instream flow and recreation in-channel diversion water rights). Additional flexibility and adaptation of the prior appropriation doctrine may be warranted to ensure the equitable allocation of Colorado's remaining Colorado River Compact entitlement among the river's sub-basins within Colorado and to equitably allocate water uses and to ensure water rights (including conserved consumptive use) are equitably administered in the event of interstate compact administration.

Background:

Water often does not naturally exist in sufficient quantities where and when it is needed to sustain human settlement and enterprise in Colorado. As a scarce resource, the demand for which exceeds its supply, water in Colorado requires a system of allocation and enforcement to meet the needs of Colorado's citizens and the natural environment, both current and future.

Colorado's prior appropriation doctrine is enshrined in the state's constitution, which states in relevant part:

“Section 5. Water of streams public property: The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided,” and

“Section 6. Diverting unappropriated water - priority preferred uses: The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes.”

(Colorado Constitution, Article XVI)

Additionally, a rich body of law, both legislative and judicial, has evolved to address the state's need for an orderly and transparent system of water administration and the embodiment of the prior appropriation doctrine as that system.

Prior Appropriation, Page 2

Adopted July 18, 2006

Revised and readopted April 21, 2009

Revised and readopted April 17, 2012

Readopted April 15, 2015

Revised and readopted April 17, 2018

Re-revised and readopted July 17, 2018

Colorado's prior appropriation doctrine has proven its ability to adapt to the changing needs and values of the state regarding its scarce water resources. Notable among recent adaptations of Colorado's water allocation system are the 1972 Instream Flow Act (C.R.S. 37-92-102) and the 2001 Recreation In-Channel Diversion Act (C.R.S. 37-92-103(10.1) & (10.3)), both of which were adopted in a manner consistent with and incorporated into the prior appropriation system.

The 1922 Colorado River Compact and the 1948 Upper Colorado River Basin Compact provide that under certain circumstances, Colorado may be required to curtail water uses within the Colorado River basin to comply with interstate compact administration. The strict application of the prior appropriation doctrine in the event of compact administration could result in extreme hardship and economic disruption throughout the state. Merely the potential for future curtailment may result in undesirable speculation and competition for firm water supplies as Colorado moves closer to its full compact entitlement. Therefore, limited and targeted future adaptation of the prior appropriation doctrine may be necessary in order to equitably allocate the state's remaining Colorado River entitlement and to equitably address the curtailment of water uses that may be necessary to comply with the 1922 and 1948 compacts.

Colorado River Compacts
Adopted July 19, 2005
Revised and readopted April 2008
Revised and readopted July 2011
Revised and readopted April 2014
Revised and readopted April 2017

Colorado River Compacts

Colorado River Water Conservation District Policy Statements:

The Colorado River Compacts of 1922 and 1948 must be enforced, protected and defended from legal challenge or amendment unless all seven basin states agree to the terms of any proposed change.

The seven basin states must reconcile differences in Compact interpretation in a mutually acceptable manner.

The Colorado River Water Conservation District (River District) recognizes that the Colorado River is a highly variable system, and this hydrologic variability is forecast to become more frequent and more pronounced in the future. Therefore, the State of Colorado, in cooperation with the other three upper division states, must implement compact compliance strategies to be fully prepared for periods of extended droughts that minimize impacts to existing uses and minimize the potential for shortages and disruptions to present and future West Slope economies.

New Colorado River water uses must be developed in a manner that minimizes the risk of compact curtailment to existing users.

The River District shall lead efforts analyze the risk and risk factors of compact curtailment. Such analysis shall explore early warning signs of possible curtailment and recommend alternative avoidance and mitigation responses.

The River District shall lead the effort to inventory and maximize the efficient use of water supplies exempt from compact administration to ensure western Colorado retains and can capitalize on the full benefit of pre-compact water rights.

Background & Discussion:

The State of Colorado is signatory to the 1922 Colorado River Compact and the 1948 Upper Colorado River Basin Compact. The 1922 and 1948 Compacts, along with the 1944 International Treaty with Mexico, other federal laws, and United States Supreme Court decisions comprise the “Law of the River.” The diversion of Colorado River water for consumptive beneficial uses within the State of Colorado is subject to, and limited by, provisions of the Law of the River.

Today, it is clear that the 1922 Compact negotiators employed a limited and unnaturally wet

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hydrologic record in their deliberations, resulting in allocation of a greater than sustainable quantity of Colorado River water. This and other unresolved technical and legal issues result in conflicting interpretations of the 1922 Compact. Resolution of unresolved Colorado River compact issues, such as the Mexican Treaty obligation and the accounting of Lower Basin tributaries, will be challenging, time consuming, and costly. However, the cost of inaction is even greater.

The primary purposes of both compacts are to provide legal certainty regarding how much water each state can develop, to allow states to develop their water resources when the water is needed, and to preclude the interstate application of the prior appropriation doctrine. The Colorado River Compacts protect Colorado from downstream states claiming prior (senior) use of the Colorado River that would preclude Colorado's eventual development of its full consumptive use entitlement.

There are, however, disputes about the interpretation of the language of the compacts. These include conflicting language allocating the river's waters: "in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum" (*Article III(a)*) and the requirement that "the States of the Upper Division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years." (*Article III(d)*) Interbasin differences also include unresolved issues between the Upper and Lower Basin states regarding respective water delivery obligations to the Republic of Mexico. Failure of the seven basin states to harmonize the terms, conditions and interpretation of the compacts by mutual agreement invites unilateral federal intervention to resolve these differences and legal proceedings that will be protracted, divisive, and exceptionally expensive.

Colorado must continue to improve and refine technical data regarding existing Colorado River uses within the state and throughout the Colorado River Basin, including a consistent and common method for calculating consumptive uses among the four Upper Basin states. Additionally, more and better science must be developed regarding historical Colorado River flows and periodic, sustained droughts, including refinement of paleo-hydrology studies and the potential impacts of climate variability on basin-wide hydrology.

The Colorado River Compact of 1922 expressly grandfathers water uses which pre-date the compact, protecting them from being curtailed when compact administration occurs. Therefore, full legal protection, along with efficient use, including by exchange, is of paramount importance regarding these strategic water rights.

The River District's involvement should include an active education program of its constituents, as

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well as other affected parties, regarding the issues involved, the importance of water storage and conservation, and the consequences of inaction.